DATO' MOHD ANUAR EMBONG & ANOR

v.

BANK BUMIPUTRA MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD NOOR AHMAD JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: T-02-126-94]
26 FEBRUARY 2003

CONTRACT: *Breach - Action for damages - Agreement to discharge charges on titles of land - Delay in effecting discharge - Loss of profits - Claim for - Whether too remote - Whether loss naturally arose from breach - Contracts Act 1950, s. 74(1) - Mitigation - Whether losses could have been mitigated upon occurrence of breach - Whether claim to be reduced*

The appellants had secured an overdraft facility from the respondent for the construction of houses and shops on a piece of land. The master title of the said land was charged to the respondent as security. Subsequently, the appellants applied for an increase of the said facility and enclosed a feasibility study report ('FSR') to support their application. At this point, the respondent agreed to discharge six titles from the master title, which had been sub-divided previously into 66 titles, for the appellant to raise part of the bridging finance. However, the respondent had delayed the discharge of the charge to said titles. As a result of the delay, the appellants were unable to complete phase 3 of their project. They instituted a claim for loss of profits against the respondent, alleging that the respondent, by reason of the delay, had breached the agreement to discharge the charges. At the assessment of damages stage, the trial judge awarded RM5,000 to the appellants as nominal damages. Dissatisfied with the said award, the appellants appealed to this court.

Held:
Per Mohd Noor Ahmad JCA

[1] Based on the series of transactions and correspondence between the parties, the respondent knew the purpose of the overdraft facility and the projected net profits to be made by the appellants as reflected in the FSR submitted by the appellants. And, the respondent also knew

of the real purpose for the six charges to be discharged. The respondent had failed to honour its obligation and therefore, the loss of profits naturally arose from that breach in that the parties, especially the respondent, knew that failure to discharge the charges would likely result from that breach. This being the case, the loss of profits could not be said to be too remote. (p 134 a-d)

[2] In relation to the measure of damages, there was sufficient evidence tendered by the appellants to support the figure of RM3,401,820 for loss of profits. (p 134 e)

[3] However, the appellants had failed to mitigate their losses after the breach had occurred. They did not make any attempts to raise the required sum even though the property was valued at RM4 million and they had the titles as well as physical possession of the lots in question. Thus, the appellants would only be entitled to 50% of the loss of profits claimed. (p 135 c, e-g)

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu ('perayu') telah mendapatkan kemudahan overdraf daripada responden bertujuan untuk pembinaan rumah dan rumah kedai di atas sebidang tanah. Hakmilik utama tanah tersebut telah digadaikan kepada responden sebagai sekuriti. Sejurus kemudian, perayu memohon untuk penambahan kepada kemudahan tersebut dan menyertakan laporan kajian kebolehlaksanaan untuk menyokong permohonan mereka. Responden bersetuju pada masa tersebut untuk melepaskan gadaian ke atas enam hakmililk daripada hakmilik utama, yang telah dibahagikan sebelum ini kepada 66 bahagian, untuk membolehkan perayu mendapatkan kemudahaan kewangan yang diperlukannya. Akan tetapi responden telah melambatkan pelepasan gadaian hakmilik tersebut. Berikutan ini, perayu gagal untuk menyiapkan fasa 3 projek mereka. Mereka membuat tuntutan gantirugi ke Mahkamah Tinggi atas kehilangan keuntungan terhadap responden sambil mengadu bahawa penangguhan berkenaan merupakan suatu salah-ingkar perjanjian untuk pelepasan gadaian. Pada peringkat taksiran gantirugi, hakim bicara telah mengawadkan sebanyak RM5,000 kepada perayu sebagai gantirugi nominal. Berasa tidak puas hati dengan keputusan tesebut, perayu telah membuat rayuan ke mahkamah ini.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Berdasarkan rintetan transaksi dan perhubungan di antara pihak-pihak, didapati bahawa responden sememangnya sedar akan tujuan kemudahan overdraf dan anggaran keuntungan bersih yang boleh dicapai oleh perayu, seperti yang digambarkan dalam laporan kajian kebolehlaksanaan mereka. Tambahan pula, responden tahu mengenai tujuan sebenar untuk pelepasan enam gadaian tersebut. Responden gagal untuk menunaikan katajanjinya, dan oleh itu kehilangan keuntungan sememangnya berpunca daripada salah-ingkar berkenaan dalam mana pihak-pihak, terutama sekali responden, sedar bahawa salah-ingkar tersebut berkemungkinan besar akan mengakibatkan kegagalan melepaskan gadaian. Oleh itu, tidak dapat dikatakan bahawa kehilangan keuntungan tersebut tidak terduga.

[2] Berkenaan dengan taksiran gantirugi, terdapat bukti yang secukupnya daripada perayu untuk menyokong jumlah sebanyak RM3,401,820 sebagai kehilangan keuntungan.

[3] Walau bagaimanapun, perayu gagal untuk mengurangkan kerugian mereka selepas berlakunya salah-ingkar. Mereka tidak membuat apa-apa untuk mendapatkan jumlah wang yang diperlukan walaupun hartanah tersebut dinilaikan sebanyak RM4 juta dan hakmilik serta lot-lot berkenaan sememangnya berada di tangan mereka. Maka, perayu hanya berhak kepada 50% daripada kehilangan keuntungan yang dituntut.

Rayuan dibenarkan dengan kos.]

Legislation referred to:
Contracts Act 1950, s. 74(1)
Evidence Act 1950, ss. 65(1)(a)(i), 66

For the appellants - Cecil Abraham (B Thangaraj, Hj Mokhtar Ngah & Riswant Singh); M/s Thangaraj & Assoc
For the respondent - Tommy Thomas (Peter Pereira); M/s Skrine & Co

[Appeal from High Court, Kuala Terengganu; Originating Summons No: 24-132-89]

Reported by M Maheswaran

JUDGMENT

Mohd Noor Ahmad JCA:

On 28 June 1979 the respondent granted the appellants an overdraft facility of RM1.5 million out of which the sum of RM830,000 was bridging finance for the construction of 66 units of houses and shops on land described in the master title as Lot 1233, EMR 892, Mukim of Batu Burok, Kuala Terengganu ('the said land') (see exh. P7). The master title was charged to the respondent as security. On 2 January 1983 the appellants by letter applied for an increase of the facility intimating therein that the projected net profit from the project was RM3,401,820 and enclosing thereto a detailed Feasibility Study Report ('the FSR') (exh. PS). On 28 March 1983, the overdraft facility was superseded by another overdraft facility of RM2.5 million for the same purpose (exh. P9). Subsequently, the land was sub-divided into 66 titles. Going by the pleadings, on 23 June 1987 the respondent agreed to discharge the charges on six titles (exh. P13) to enable the appellants to raise part of the bridging finance. Originally, there were 11 titles involved, out of which, five titles were to be surrendered to the relevant authorities. However, they were discharged only in March 1992. Phases 1 and 2 of the project were completed but phase 3 was not completed because the appellants were unable to raise part of the bridging finance required as the result of the respondent's breach of the agreement to discharge the charges.

The liability for breach of contract on the part of the respondent had been declared by the High Court and is not an issue before us.

The learned senior assistant registrar (SAR), in the assessment of damages pursuant to the order of the High Court dated 10 August 1991, awarded the following sums in favour of the appellants:

Loss of profit	...	RM3,401,820
Damages for shame		
30% of RM3,401,820	...	RM1,020,546
Total	...	RM4,422,366

and interest at 8% p.a. from 28 March 1986 until realisation.

On appeal, the learned judge set aside the order of the SAR and as a substitute, entered judgment against the respondent in the sum of RM5,000 as nominal damages with interest at 8% p.a. from the date of the judgment to the date of realisation and ordered each party to bear their own cost in the High Court and before the SAR. The learned judge held that the loss of profit as claimed did not fall under the first limb of s. 74(1) of the Contracts Act 1950 ('the Act'). He concluded that the appellants could not and did not suffer any damage arising naturally from the breach of contract committed by the respondent because the open market value for the 11 lots since the date of the breach until the date of the actual discharge of the charges (30 June 1987 to March 1992) had increased in value by about RM100,000. He also held that the loss of profit did not come under the second limb of the section because he found no evidence to substantiate that the loss of profit on account of the charges in respect of the 11 lots not being discharged was within the contemplation of the parties at the time when the respondent agreed to discharge the charges. And therefore, he disallowed the claim for loss of profit as being too remote. With regard to the measure of damages, the learned judge was not satisfied that the proof on the measure of damages had been established on the balance of probabilities because the figure of RM3.4 million cited in exh. P8 as the projected nett profit was merely a bare statement of fact. There was nothing in exh. P8 or in the oral evidence of PW8 to show how the sum of RM3.4 million was arrived at and that PW8's evidence was too general and vague to assist the court in determining whether or not the projected profit was reasonable.

Before us, only the claim for loss of profit was canvassed. Hence, we need not consider the merits on the claims under other heads. We reviewed the findings of primary facts by the learned SAR and we are of the view that the claim for loss of profit falls both under the first and second limbs of s. 74(1) of the Act. The section reads:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
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> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Having scrutinized the series of transactions and correspondence between the parties as a whole we are satisfied that the respondent knew the purpose of the overdraft facility and the projected net profits to be made by the appellants from the project as reflected in the FSR submitted. The reliability of the contents of the FSR must have been accepted by the respondent otherwise the substituted overdraft facility of RM2.5 million would not have been approved. And further, after having been informed by PW8 that he needed only RM1 million as bridging finance to proceed with phase 3 of the project surely the respondent knew that the appellants required the charges on the six titles to be discharged for the purpose of raising the extra RM400,000 through sales of the lots to other parties. In short, the respondent knew the real purpose for the six charges to be discharged. As phase 3 could not get off the ground because the appellants could not raise the RM400,000 as the result of the failure on the part of the respondent to honour its obligation, to our mind, the loss of profit naturally arose from the breach and that the parties, especially the respondent, knew when it agreed to discharge the charges that loss of profit would be likely to result from the breach. Therefore, the claim for the loss of profit was not too remote.

With regard to the measure of damages there are ample evidence to support the figure of RM3,401,820 for loss of profit. Firstly, though the original FSR was not tendered at the hearing, the appellants were justified in adducing secondary evidence of it under s. 65(1)(a)(i) of the Evidence Act 1950 since it was lost from their possession and an original copy of the FSR appeared to be in the possession of the respondent and that the required notice to produce it at the hearing was given to the respondent purportedly under s. 66 of the Evidence Act. PW8 deposed on the selling price of each type of building to be constructed which totalled up to RM10,820,000 (see Rekod Rayuan Tambahan encl. (ID) at p. 27) and he was not challenged on this. Secondly, PW7 the quantity surveyor for the project testified that the estimated construction cost was RM4.7 million supported by the figure of RM4,768,500 as stated in exh. P6 (see Rekod Rayuan Tambahan encl. (ID) at p. 19 and Rekod Rayuan encl. (1A) at p. 244) and he too was not challenged on this.

PW8 confirmed that figure as the construction cost (see Rekod Rayuan Tambahan at p. 27). Therefore, the profit that was lost is RM3,854,100 as reflected in the statement of proof of loss of profits prepared by the appellants' solicitors and submitted to us at the hearing to which the

respondent's counsel agreed as to the correctness of the particulars in the statement *vis-a-vis* the evidence. And lastly, the projected net profit from the project is stated in exh. P8 as RM3,401,820. As this figure was given in the letter accompanied by the FSR the reliability of which, as we have stated earlier, was not doubted by the respondent the question of whether the projected profit was reasonable or not as raised by the learned judge is a non-issue. Although the statement provides the loss of profit at RM3,854,100 it appears to us that in this appeal the appellants are only pursuing on the figure of RM3,401,820 on the claim for loss of profit. Therefore, we are satisfied on the balance of probabilities that the loss of profit is that figure.

However, we are of the view that the appellants failed to mitigate their losses after the breach had occurred on 20 June 1987. We compute that date as the date of the breach because in the letter dated 11 June 1987 (exh. P12) the appellants gave the respondent eight days notice to comply with their demand to release the charges. That being the case, the sale and purchase agreements entered into between the appellants and PW1, PW2 and PW4 separately on 29 May 1983, 16 June 1987 and 20 June 1987 respectively cannot be considered as sufficient mitigating factors because those transactions were made before the breach occurred and not really made as the result of the breach but made during the appellant's earlier effort to raise the extra RM400,000 as part of the bridging finance for phase 3. The appellants did not make any attempt to raise the required fund from other sources despite the fact that the property was valued at RM4.0 million and PW8 was having custody of the titles to the six lots and in physical possession of those lots. Furthermore, during the period of about nine years between the date of the breach and the actual discharge of the charges PW8 could have instructed his solicitors to initiate the discharge of the charges as the titles were in his custody and yet he did not do so which rendered phase 3 a non-starter. By reason of the failure to mitigate the losses it is our considered view that the appellants are only entitled to fifty (50) percent of the loss of profit as claimed, having regard to the fact that the development of phase 3 could not be proceeded with at all by the respondent's breach which resulted in the inability of the appellants to raise only a small portion, that is to say, about 28 percent of the total amount of bridging finance required for the phase.

Therefore, we allow the appeal with costs here and in the court below and set aside the order of the learned judge and as a substitute, judgment is hereby entered against the respondent in the sum of RM1,700,910 as damages for loss of profit, with the interest at 8% p.a. from the date hereof until realization. The deposits paid into court by the appellants are to be refunded.

My learned brothers Denis Ong Jiew Fook and Alauddin Mohd Sheriff JJCA have read this judgment in draft and have expressed their agreement with it.